Mary C. Lovejoy
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007

mlovejoy@americancable.org
(202) 603-1735

December 21, 2018

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Communication of the American Cable Association; *Leased Commercial Access*, MB Docket No. 07-42; *Modernization of Media Regulation Initiative*, MB Docket No. 17-105

Dear Ms. Dortch:

On December 19, 2018, Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association ("ACA"), and I met with Michelle Carey, Nancy Murphy, Holly Saurer, Martha Heller, Steven Broeckaert, Katie Costello, and Diana Sokolow of the Media Bureau to discuss proposals set forth by ACA in comments filed in response to the Commission's Further Notice of Proposed Rulemaking on Leased Commercial Access.[1]

In the meeting, ACA explained that the current leased access rules impose substantial procedural and administrative burdens on cable operators, the costs of which are rarely recouped by the maximum fees that operators – particularly small operators whose systems are less profitable – are permitted to charge under the existing implicit rate formula. As ACA explained in its comments, small cable operators can, in some cases, spend upwards of a thousand dollars or more in man-hours and consulting fees to respond to a single leased access request.[2] In most cases, potential lessees decline to pursue their request for leased access after receiving a response to their initial request, and the rules do not permit the cable operator to recover the costs spent in crafting that response. Yet even in those rare cases where a leased access agreement is

[1] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, 33 FCC Rcd 5901 (2018).

[2] *See Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42; 17-105, Comments of the American Cable Association at 3-7 (filed July 30, 2018) ("ACA Comments").

eventually finalized, the rates that the operator may charge (which for small operators typically amounts to tens of dollars a month for a weekly 30 minute program) are not nearly enough to recoup these administrative costs, much less to make a "reasonable profit," as the Commission intended when it adopted the implicit rate formula.[3]

To remedy this situation, in addition to adopting the proposals set forth in the FCC's rulemaking, ACA offered several other proposals designed to lower the cost of responding to requests for information about leased access. First, ACA suggested that the Commission make it simpler for cable operators to determine the rates that they may charge for leased access. ACA explained that the most burdensome element of responding to a leased access request is the requirement to provide a complete schedule of the operator's full-time and part-time leased access rates. The formula for calculating the average implicit fee for a particular channel is complex, and the data points needed to complete these calculations – particularly those related to the number of subscribers on each tier – are constantly in flux, so a cable operator must recalculate the fee to respond to every single leased access request. In its comments, ACA suggested that the Commission could greatly reduce the administrative burdens on individual cable operators by adopting and publishing a uniform, non-discriminatory "safe harbor" per channel rate card that any cable operator may elect to use in lieu of calculating individualized rates.[4] As an alternative, ACA has suggested that the Commission permit cable operators to calculate leased access rates on a specific date and use those rates for all leased access agreements for the next three years,[5] and to use the simplified rate formula described by NCTA – The Internet and Television Association.[6]

Second, ACA suggested certain changes related to the information that cable operators must provide in response to a request for leased access. The current rules require cable operators to provide four pieces of information in response to a request for leased access information: 1) how much of the operator's leased access set-aside capacity is available 2) a complete schedule of the operator's full-time and part-time leased access rates; 3) rates associated with technical and studio costs; and 4) if requested, a sample leased access contract.[7] As ACA explained in its comments, leased access requests for small and mid-sized operators are few and far between, and thus gathering this information and arranging it into a standard format is more burdensome than

[3] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Second Report and Order and Second Order on Consideration of the First Report and Order, 12 FCC Rcd 5267, ¶ 19 (1997) ("When the full set-aside capacity is not leased to unaffiliated programmers, the maximum rate would be based on the operator's reasonable and quantifiable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit.").

[4] ACA Comments at 7.

[5] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Reply Comments of the American Cable Association at 3-4 (filed Aug. 13, 2018) ("ACA Reply Comments").

[6] *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42; 17-105, Comments of the NTCA – The Internet and Television Association at 25-28 (filed July 30, 2018) ("NCTA Comments").

[7] 47 C.F.R. § 76.970(i)(1).

it might appear from the outside.[8] Therefore, rather than require cable operators to provide broader information about their leased access capacity, rates, and technical and studio costs, the Commission should permit operators the option of providing information that is specifically tailored to the potential lessee's bona fide request.

Specifically, rather than providing information about the total amount of capacity that is available on a cable system, an operator should be permitted to simply affirm whether there is sufficient capacity available to accommodate the time slot desired in a bona fide request.[9] If the requested time slot is not available, the operator could offer a list of comparable dates and times that are available,[10] and be responsive to subsequent inquiries into the availability of other desired time slots. This approach is not only simpler for cable operators,[11] it is more useful to programmers, who simply want to know whether their requests can be accommodated.

Similarly, in lieu of providing a complete schedule of the actual full and part-time leased access rates, a cable operator should be permitted to respond to a bona fide request for leased access with rates that are specific to the details of that request. In other words, in response to a programmer's time slot request to run a program every Friday from 8:00 to 8:30 PM, the operator could provide the rate for that specific time slot (or for comparable time slots, if that particular one is not available).

Moreover, should the Commission choose not to eliminate the requirement to provide technical and studio costs at all, as ACA requested in its comments, an approach similar to that described above could be used for these costs, to the extent that they are even needed by a lessee.[12] With respect to technical costs in particular, a cable operator is only permitted to charge

[8] *See* ACA Comments at 3-4.

[9] ACA Comments at 8.

[10] Consistent with the Commission's rule related to part-time programming, comparability of time slots would be determined "by objective factors such as day of the week, time of day, and audience share." 47 C.F.R. § 76.971(a)(4).

[11] As ACA explained in its comments, calculating leased access channel capacity can be complicated because, by statute, the amount of capacity that must be made available depends on the number of activated channels on the system. But a cable systems' channel capacity is not static – it changes as cable operators add and drop channels, and repurpose system bandwidth from video to broadband services. While a cable employee may know (or may be able to find out with reasonable effort) how much leased access programming is carried, he or she would not know exactly how much capacity is "available" in relation to the overall set aside required by the statute without running the numbers each time a response to a request is required.

[12] Even some leased access programmers agree that certain information, such as technical and studio costs, and sample contracts, is not necessary for a potential lessee to determine whether to further pursue a leased access agreement. *See, e.g. Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42; 17-105, Comments of the Leased Access Programmers Association at 13 (filed July 30, 2018) ("There is a difference between a request for information and a need to submit a bona fide leased access request. There is a need for certain general information to determine whether or not there is a reason to proceed with a leased access request. … When a prospective user has sufficient information to determine that they are ready to move forward and need more detailed information such as a sample contract, detail rate information, tier placement etc., that would take more effort to compile or mail, that should be submitted in a more formal (bona-fide) leased access request."); *see*

a leased access programmer for technical support that is "beyond that provided for non-leased access programmers on the system."[13] In other words, cable operators may only charge for technical support services that they do not commonly provide, and so the rule effectively requires operators to provide a price for an endless array of potential technical requests that no other programmer carried by the operator has needed. In the meeting, ACA suggested that, rather than require cable operators to provide a schedule of technical and studio costs, the Commission should require "bona fide" requests to include a description of any technical support and studio resources sought by the potential lessee. The operator could then have the option of providing in its response an estimate of the rates that would be charged to accommodate the request, if possible.[14]

With respect to sample contracts, ACA explained that it is unreasonable to expect cable operators to undertake the expense of creating a new sample contract or updating an existing one before they receive an actual, concrete, and detailed request for leased access. Small cable operators in particular operate so few leased access agreements that they often do not have a suitable sample contract readily at hand. If the Commission chooses to maintain this requirement, it should clarify that a cable operator may meet its obligation by providing a term sheet, rather than a complete sample contract, which is a common practice in the industry in initial talks between cable operators and non-leased access programmers.

ACA also discussed its proposal to permit cable operators to charge a reasonable, uniform, and non-discriminatory closing fee upon the execution of a leased access agreement. This closing fee would be distinct from any initial application fee, and would be designed specifically to cover the administrative costs incurred from the time the operator receives a written request for leased access to the actual completion of the agreement, including the sometimes substantial back and forth discussions needed to iron out details related to technical issues, delivery of programming, and financing. This would ensure cable operators, particularly those who are small and medium-sized, do not lose money on providing leased access – an outcome that is inconsistent with the intent of the rules.

Finally, ACA discussed the proposal set forth by NCTA to eliminate, or at least limit, part-time leases.[15] We explained that the revenue generated by 30-minute programs is miniscule, while the administrative costs of responding to a request for part time leased access are no less burdensome than the cost of responding to a request for full time leased access programming, which generates substantially greater revenue. Moreover, there are numerous other platforms available for content producers who wish to distribute short-form programs.[16]

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also Comments of the Small Business Network at 3 (filed July 30, 2018) (arguing in favor of imposing additional information requirements, but excluding information on technical and studio costs and sample contracts from their list of information that leased access programmers need in advance of making a leased access request).

[13] 47 C.F.R. § 76.971(c).

[14] In reality, many cable operators do not operate studios and thus cannot offer studio resources at any price.

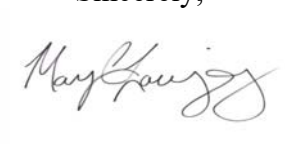
[15] NCTA Comments at 22-25.

[16] *See* ACA Reply Comments at 5-6.

ACA concluded by explaining that leased access is particularly problematic for small cable operators, as the formula for determining a maximum allowable leased access rate is related to the system's overall profitability. Thus, a system with one million subscribers is permitted to charge significantly more for leased access programming than a system with just one thousand subscribers. At the same time, it is no less costly for a small system to process a leased access request (and in fact may be more costly, since they typically do not have set procedures in place for dealing with the very few requests they do receive). For this reason, ACA recommended that at the very least the Commission adopt the reforms discussed above for small cable systems owned by small operators, as those terms are defined in Sections 76.901(c)[17] and 76.901(e),[18] respectively.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,



Mary C. Lovejoy

Cc: Michelle Carey
Nancy Murphy
Holly Saurer
Martha Heller
Steven Broeckaert
Katie Costello
Diana Sokolow

[17] 47 C.F.R. § 76.901(c) ("A small system is a cable television system that serves 15,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend.").

[18] 47 C.F.R. § 76.901(e) ("A small cable company is a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems.").